IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. — 77-1175

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner.

vs.

MAURICE PENDLETON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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Your Petitioner, the People of the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered in the instant case on August 12, 1977. The State of Illinois remedies available to your Petitioner have been exhausted in that the People's timely Petition for Leave to Appeal to the Supreme Court of the State of Illinois was denied by that court on November 23, 1977. (see Appendix B.)

OPINIONS BELOW

The defendant, Maurice Pendleton, was originally charged with the March 31, 1970, murders of Dewey Crockett, Jr. and Deborah Goodlow. At his first jury trial, he was found guilty of the Goodlow murder, but that conviction was set aside by the Appellate Court of Illinois, First District. *People* v. *Pendleton*, 24 Ill. App. 3d 385, 321 N.E. 2d 433 (1974). A second trial for the Goodlow murder resulted in a mistrial. Upon defendant's third trial, he was once more found guilty by a jury, and once more appealed to the Appellate Court of Illinois, First District. That court set aside the jury trial conviction on August 12, 1977. The opinion of the court in that case (the opinion from which Certiorari is herein sought) is not reported since the mandate of the Appellate Court has been stayed pending further action by the People. The opinion of the Appellate Court appears in Appendix A of the present Petition for Certiorari. The People sought Leave to Appeal to the Supreme Court of Illinois which, on November 23, 1977, denied Leave to Appeal. (see Appendix B).

JURISDICTION OF THIS COURT

The Supreme Court of Illinois denied review of the opinion of the Appellate Court of Illinois, First District,

on November 23, 1977. The jurisdiction of the Supreme Court of the United States to hear this case on Writ of Certiorari is invoked under 28 U.S.C. 1257(3), since in the proceedings in the courts of the State of Illinois the defendant has specifically set up and asserted a right under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Whether the defendant, represented at trial by two attorneys, only one of whom was even alleged to be laboring under a conflict of interest, may successfully claim that he has been denied his right to effective counsel under the Constitution of the United States, Amendment VI., when (1), the alleged conflict of interest involved only a limited involvement by one attorney with the office of the Illinois Attorney General as to two specific cases; (2), where no allegation of prejudice was made and no showing of actual conflict of interest on the part of counsel was even attempted by defendant; and when (3), the record is devoid of any factual basis for a claim of either conflict of interest or prejudice resulting to the defendant therefrom.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI.:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense".

STATEMENT OF THE CASE

A.

General Factual Background

The defendant was originally charged with the murders of Dewey Crockett, Jr. and Deborah Goodlow. He was convicted at a jury trial for the murder of Ms. Goodlow, and that conviction was subsequently set aside by the Appellate Court of Illinois, First District, upon grounds not relevant to the present Petition. *People* v. *Pendleton*, 24 Ill. App. 3d 385, 321 N.E. 2d 433 (1st Dist., 1974). A second trial resulted in a mistrial. At the third trial a jury again found Pendleton guilty of the murder of Deborah Goodlow. Once again the Appellate Court of Illinois, First District, set aside the conviction. Subsequently, the Illinois Supreme Court denied Leave to Appeal. Throughout this petition the third trial, which is the only one which concerns us here, is referred to simply as the trial.

As even the brief summary of the evidence presented by the Appellate Court indicates (see Appendix A), the evidence of the guilt of the instant defendant was overwhelming. In fact, at no time during the process of appeal in Illinois did Maurice Pendleton challenge the sufficiency of the evidence to support the guilty verdict returned by the jury in the trial court. A woman who was working in the lobby of the Madison Park Hotel in the early morning of March 31, 1970, positively identified Maurice Pendleton as the man who entreed the hotel lobby with Dewey Crockett and who, with Crockett, went upstairs to the room of hotel resident Deborah Goodlow. The defendant was described in detail, and particular note was taken of his being clad in a distinctive fur coat. Other evidence indicated

that on former occasions Maurice Pendleton had been seen clad in such a coat, and that defendant had often been seen in the company of Dewey Crockett, Jr. (R. 412-415). Some 45 minutes later, two women in the lobby heard screams coming from a rear stairwell of the hotel but, upon investigating, did not see anyone there. They then heard the screams once again and saw Deborah Goodlow emerge from the stairwell, shoeless and clad only in a green dress. (R. 463, 549) Ms. Goodlow was upset and visibly trembling. She told the women that someone had been shot in her apartment and asked for help, but she ignored the suggestion of the desk clerk that she hide behind the desk. (R. 550) Instead, Ms. Goodlow went down a hallway and exited the hotel through a side door. The defendant then emerged from the elevator, crossed the hotel lobby, and started out the front door; however, he retraced his steps and exited the side door through which Ms. Goodlow had gone when he heard pounding on that door. (R. 468, 551)

Mr. Valley Morrison, whose apartment was near the Madison Park Hotel and who could see the street near the hotel from his windows, also testified for the prosecution. (R. 582) His attention was drawn to the window when he heard the voice of a woman from the alley below screaming for help. (R. 582-583) He went to the window and opened it. He noted that modern street lighting and reflection from snow on the ground made the scene quite bright, brighter than was usually the case. He saw Deborah Goodlow running down the middle of the street, pursued by the defendant. (R. 595) The witness saw defendant catch the woman, saw her turn toward Pendleton and raise her hands, and saw Pendleton shoot her. (R. 585-586) Then, as Ms. Goodlow fell to her knees, the witness saw the defendant walk up to her and shoot her again at point blank range.

As we have noted, the sufficiency of this evidence to support guilt was not challenged. Rather, the defendant argued before the Appellate Court of Illinois, First District, that his appointed counsel was laboring under a conflict of interest in that counsel was at the time serving under appointment in two cases as a Special Assistant Illinois Attorney General.

B.

Facts Material To The Question Presented.

On August 11, 1975, Mr. Thomas E. Holum was appointed by the court as attorney for the defendant and on that date counsel filed his formal appearance. (R. C11, C85) On September 24, 1975, having previously served the defendant with a copy thereof, Mr. Holum filed with the trial court a written motion to withdraw as counsel for Maurice Pendleton. (R. C93, C96) In the accompanying affidavit Mr. Holum stated that other legal duties were so pressing that he feared that he might not be able adequately to prepare the defense of Maurice Pendleton. Among these duties he listed two cases pending in the Federal Courts which dealt with the status of persons who had been committed under the Illinois Sexually Dangerous Persons Act. *Valkmar* v. *Sielaff* and *Stachulak* v. *Coughlin*. (R. C94) In those two cases Mr. Holum was serving in the capacity of a Special Assistant Illinois Attorney General although he had no other connection at that time with the office of the State's Attorney General.

A hearing on the petition to withdraw was held on September 24, 1975. (Supp. R. 1-13) The defendant was present. In the presence of the defendant Mr. Holum again drew the attention of the court to the two cases in which he was serving by appointment as a Special Assistant Attorney General. (Supp. R. 1-2) Pendleton, who had dismissed several other appointed attorneys before Mr. Holum's appointment, told the court that he was getting along well with Mr. Holum and would be sorry to lose his services. (Supp. R. 4) Following a conference between Mr. Holum and Pendleton, counsel indicated in open court and in the defendant's presence that it was Pendleton's desire to proceed to trial with Mr. Holum as his attorney. (Supp. R. 8)

As we have previously noted, however, Thomas Holum was not the only appointed attorney who represented Maurice Pendleton during the course of the trial of the instant case. Because Mr. Holum indicated that, although he had tried more than sixty bench trials in criminal cases, this was his first trial before a jury, the trial court appointed co-counsel. This was Mr. Saul Leibowitz, vice-chairman of the Chicago Bar Association Committee for the defense of Indigent Prisoners. (R. 72-73) Mr. Leibowitz joined Mr. Holum on the case on December 9, 1975. Mr. Leibowitz was present throughout all proceedings in the case thereafter; that is, throughout the entire trial and post-trial portions of the case. (R. 80, 241, 389, 451, 508, 535, 573, 620, 640, 669, 804) As is noted in the opinion of the Illinois Appellate Court, this second attorney took an active part in the proceedings. At one point in the trial, against the advice of the trial judge, Pendleton dismissed both counsel as having lied to him; but both men remained as advisers to the defendant during this period.

At the close of the trial, motions for a new trial were made, in which no mention was made of the alleged conflict of interest on the part of Thomas Holum.

On review to the Appellate Court of Illinois, for the first time this alleged conflict was presented and it was upon this alleged conflict that the Appellate Court principally set aside the murder conviction of the instant defendant.

C.

Manner In Which The Federal Question Was Raised

The federal question herein presented is whether the defendant was denied his right to counsel under the Sixth Amendment to the Constitution of the United States and, more specifically, whether the determination that he was denied such a right was mandated by the holding of the Supreme Court of the United States in *Glasser* v. *United States,* 315 U.S. 60 (1942). The question was not at any time raised during trial or in post-trial motions, but was presented for the first time on review before the Appellate Court of Illinois, First District. The main thrust of the Appellate Court's opinion reversing the murder conviction of Maurice Pendleton is that he was in fact denied his right to effective assistance of counsel and that such result is mandated by the decision in *Glasser* v. *United States, supra.* It is from this determination, which we submit is an erroneous interpretation not only of the Sixth Amendment, but also of the *Glasser* decision and its subsequent interpretation by Federal Courts, that the People of the State of Illinois now seek the Writ of Certiorari to the Appellate Court of Illinois, First District.

REASONS FOR GRANTING THE WRIT

THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION OF THIS COURT IN GLASSER *v.* UNITED STATES HAS BEEN CONTINUALLY MISINTERPRETED AND MISAPPLIED BY THE ILLINOIS COURTS; TO ENSURE COMPLIANCE WITH GLASSER, THIS COURT SHOULD SET ASIDE THE ERRONEOUS DETERMINATION OF THE APPELLATE COURT BELOW SINCE (1), THERE IS NO CONFLICT OF INTEREST PRESENT IN THE INSTANT CASE AND, (2), THE RECORD SHOWS NO PREJUDICE TO THE DEFENDANT RESULTING FROM THE ALLEGED CONFLICT OF INTEREST.

In the trial of this case Maurice Pendleton was represented by two attorneys: Thomas Holum and Saul Leibowitz. For the first time on review to the Appellate Court of Illinois, First District, the defendant alleged that he was denied his right under Amendment VI of the United States Constitution to the effective assistance of counsel in that one attorney, Mr. Holum, was laboring under an alleged conflict of interest. This so-called conflict arose because Mr. Holum, an attorney in private practive, was serving by specific appointment as a Special Assistant Attorney General of Illinois as to two Habeas Corpus matters then pending in the U. S. District Court for the Northern District of Illinois. These two cases involved the necessity for either re-trial or release of a class of persons confined under the Illinois Sexually Dangerous Persons Act, which had been found constitutionally improper as to the standard of proof which it incorporated.

The defendant in this case alleged that this appointment, known to him before the commencement of the trial,

deprived him of his right to counsel. Defendant made no showing of an actual conflict of interest, nor did he point to any aspect of the trial in which prejudice resulted to him from the alleged conflict. Indeed, the record is clear that Pendleton was well aware of Mr. Holum's serving in a very limited capacity as an assistant Illinois Attorney General and that, nonetheless, it was the desire of the defendant that counsel represent him at the impending murder trial. Notwithstanding these facts, the Appellate Court of Illinois, First District, found a denial of defendant's Sixth Amendment right to effective assistance of counsel and set aside his murder conviction. In so doing the Appellate Court found that no showing of actual prejudice was necessary and that the mere fact of counsel's limited involvement with the office of the Illinois Attorney General, which office among numerous other functions is sometimes charged with the prosecution of criminal cases in Illinois, created a *per se* conflict of interest on the part of Mr. Holum and mandated the setting aside of the defendant's conviction. In so holding the Appellate Court, First District, cited a number of Illinois decisions which will be discussed later in the instant Petition. However, it is clear that the precedent underlying both the present decision and those upon which it relied was the opinion of this Court in *Glasser* v. *United States*, 315 U.S. 60 (1942). It is the position of the People in the instant Petition that the rule of law espoused by the Appellate Court in the present case, and furthermore that the decisions of the Supreme Court of Illinois upon which it was based, incorporate a complete misinterpretation of the rule set forth by this Court in the *Glasser* decision, and are consequently a misapplication of the Sixth Amendment of the United States Constitution.

There is no question that the Sixth Amendment to the Constitution of the United States, as applicable to the several States through the Fourteenth Amendment, guarantees defendant in a case such as this one the right to counsel, unless that right is knowingly and intelligently waived by the defendant in open court. *Faretta* v. *California*, 422 U.S. 806 (1975); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). Furthermore, the right to counsel is the right to the undivided loyalty of counsel, unfettered by actual conflicts of interest resulting in prejudice to the criminal defendant. *United States ex rel. Robinson* v. *Housewright*, 525 F. 2d 988 (7th Cir. 1975); *United States* v. *Jeffers*, 520 F. 2d 1256 (7th Cir. 1975). In *Glasser* v. *United States*, 315 U. S. 60 (1942), this Court set aside the conviction of defendant Glasser where it was determined that an actual conflict of interest existed and that actual prejudice had arisen which prevented Glasser from receiving the full assistance of counsel mandated by the Constitution of the United States.

In *Glasser, supra,* the defendant and a number of others were changed with a conspiracy to defraud the Government of the United States. Glasser had been, for a period, an Assistant United States Attorney in the Northern District of Illinois, and it had been his primary responsibility to prosecute cases involving liquor violations. His assistant in this endeavor was one Kretske, also an Assistant United States Attorney, who was a co-defendant in the case. Glasser retained counsel to individually represent him, an attorney named Stewart. Just prior to trial, and over Glasser's openly voiced objections, Stewart was also appointed to represent Kretske who, Glasser alleged, had interests adverse to his own. In fact, this Court noted that the evidence against Glasser was not particularly strong, but was a tapestry of circumstantial evi-

dence woven from the actions of others, in particular, Kretske. This Court further noted that the appointment of Stewart was acquiesced in by counsel himself, apparently because he felt a certain compulsion to follow the obvious wishes of the trial judge in the matter. On review, Glasser alleged that these circumstances violated his right to counsel under the Constitution of the United States. In overturning the conviction of Glasser, this Court noted that there was in fact an actual conflict of interest placed upon counsel due to his dual representation of defendants with mutually adverse positions and defenses. This being true, the appointment of Stewart for Kretske was found to have been error. In light of the closeness of the case as to Glasser, it was found that this error (which might under some circumstances have been harmless) could not be said to be so as to Glasser. (315 U.S. 67.) This Court then went on to find that in fact specific incidents in the trial counsel was hampered from more completely advocating for Glasser in that to have done so might well have injured the case of Kretske before the jury in the joint trial. (315 U.S. 73-75.) Having found an actual conflict and actual prejudice, this Court concluded that there was no necessity to determine the precise degree to which that prejudice might have accrued to the detriment of Glasser, the existence of actual prejudice resulting from the conflict of interest being sufficient to show a violation of the defendant's constitutional right to the assistance of counsel. (315 U.S. 75-76.) *This Court went on to find, however, that since the conflict resulted in no actual prejudice to Kretske, there was no violation of his rights and no requirement that his conviction at the joint trial be set aside.* (315 U.S. 76-77).

It is thus clear from this Court's opinion in the *Glasser* case that when actual conflict of interest of counsel appears of record and where prejudice resulting to the defendant is shown to have resulted therefrom, the Sixth Amendment rights of the defendant have been violated and his conviction must be set aside. In conformity with these established principles, the rule has long since become standard throughout United States Courts that the defendant alleging such a violation must show upon the record (1), an actual conflict of interest and (2), actual specific prejudice resulting to the defendant from the conflict. *United States* v. *Smith,* 464 F. 2d 494 (10th Cir., 1972); *United States* v. *Fishbein,* 446 F. 2d 1201 (9th Cir., 1971); *Carlson* v. *Nelson,* 443 F. 2d 21 (9th Cir., 1971); *United States* v. *Gallagher,* 437 F. 2d 1191 (7th Cir., 1971); *United States* v. *Martinez,* 428 F. 2d 86 (6th Cir., 1970), certiorari denied, 402 U.S. 951; *Haggard* v. *Alabama,* 550 F. 2d 1019 (5th Cir., 1977); *United States* v. *Mari,* 526 F. 2d 117 (2nd Dist., 1975). Even when the alleged conflict of interest is found to exist, under *Glasser* it is further necessary that the defendant be able to show some actual prejudice resulting to him from the conflict. *United States* v. *McCord,* 509 F. 2d 334 (D.C. Cir., 1974); *Kruchton* v. *Eyman,* 406 F. 2d 304 (9th Cir., 1969). Moreover, before the question of actual prejudice may even arise, an actual conflict of interest must appear of record, and one will not be presumed simply because the potential for its existence exists. *Lugo* v. *United States,* 350 F. 2d 858 (9th Cir., 1965); *United States* v. *Cosentino,* 372 F. 2d 61 (7th Cir., 1967.) As the court well phrased the matter in *United States* v. *Lovano,* 420 F. 2d 769, 773 (2nd Cir., 1970), certiorari denied, 397 U.S. 1071:

> ". . . Some specific instance of prejudice, some real conflict of interest resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel."

Similarly, in cases involving conflicts alleged which do not deal with the always potentially hazardous instance of joint representation of co-defendants by a single attorney, the same rule has been found applicable; defendant must show some actual conflict on the part of counsel and some actual prejudice resulting from it. So, in the absence of any specific showing of actual conflict or of prejudice to the defendant, there was no violation of the right to assistance of counsel in the fact that counsel for the defendant had on prior occasions in similar cases represented a man who was the prosecution's informant and principal witness against the defendant. *United States* v. *Cochran*, 449 F. 2d 380 (5th Cir., 1974). Similarly, in *United States* v. *Florence*, 376 F. 2d 597 (7th Cir., 1967), the fact that defense counsel was a former United States Attorney who might have had some connection with the original gathering of evidence against the defendant was found insufficient to require reversal where no actual conflict of interest or prejudice to defendant resulting from it was shown of record.

Thus, it may fairly be said that as interpreted by this Court in *Glasser* v. *United States*, 315 U.S. 60 (1942), the Sixth Amendment right to effective assistance of counsel is not violated unless there is shown by the defendant appellant to have been two happenings: (1), the existence of an actual conflict of interest on the part of counsel and (2), prejudice to the defendant which is demonstrated by the record and which results from that conflict of interest. However, in the present case, although supposedly interpreting the record on the basis of *Glasser*, the Appellate Court, First District, has found that a conflict of interest may be assumed from the circumstances and that prejudice is to be presumed *per se* from the conflict of interest. Clearly, this is a misinterpretation of the Sixth Amendment, and more particularly of this Court's holding in *Glasser*.

Furthermore, not only has the court so misinterpreted the *Glasser* decision in the present case, but the courts of Illinois have uniformly misinterpreted that holding, thus calling for the intervention of this Court by way of the Writ of Certiorari.

In *People* v. *Stoval*, 40 Ill. 2d 109, 239 N.E. 2d 441 (1968), the Illinois Supreme Court held (allegedly following the *Glasser* decision), that when there was a possibility that future business of another client might not continue in the hands of counsel if he prevailed in defendant Stoval's case, there was a conflict of interest and *per se* a denial of the right under the Sixth Amendment to the effective assistance of counsel. This the Illinois Supreme Court found to be true, notwithstanding that it candidly admitted that there was absolutely no prejudice to defendant shown of record. The same misinterpretation of *Glasser*, that conflict may be assumed from circumstances and that once assumed the conflict results in *per se* prejudice, notwithstanding no showing of actual prejudice by the defendant, has been followed by the Illinois Supreme Court in subsequent decisions. *People* v. *Kester*, 66 Ill. 2d 162, 361 N.E. 2d 569 (1977); *People* v. *Meyers*, 46 Ill. 2d 149, 263 N.E. 2d 81 (1970). The rule was again set out by that court in the recent case of *People* v. *Coslet*, 67 Ill. 2d 127, 364 N.E. 2d 67 (1977), in which counsel representing defendant in a trial for the murder of defendant's wife was also attorney for the estate of the deceased wife. While in some of these instances actual conflict may have existed and demonstrable prejudice have been present, the Illinois Supreme Court never determined this, since it was of the

opinion that under *Glasser* v. *United States, supra,* a *per se* rule exists which requires no such showing of prejudice or even of an actual conflict of interest on the part of counsel. As we have shown by the above cases from the Federal Courts, this is a completely erroneous interpretation of both the *Glasser* decision and of the Sixth Amendment provision concerning counsel itself.

The interpretation adopted by the Illinois Supreme Court has been followed by the intermediate courts of review in Illinois, which have held that if a potential conflict of interest appears there is no necessity of any showing of prejudice to the defendant. *People* v. *Fuller,* 21 Ill. App. 3d 437, 315 N.E. 2d 687 (4th Dist., 1974). In a case not dissimilar to the present one, the Appellate Court of Illinois, Fourth District, has held that the mere fact that defense counsel was involved as an Assistant Attorney General handling only inheritance tax matters raised the possibility of conflict and called for the application of the *per se* prejudice rule, even though no actual prejudice was alleged or shown of record. *People* v. *Cross,* 30 Ill. App. 3d 199, 331 N.E. 2d 643 (4th Dist., 1975). In the present case again, the Appellate Court, First District, has found prejudice even though it was not even alleged, merely because of a peripheral involvement of counsel with the office of the Attorney General of the State of Illinois. In fact, the speculative nature of even the finding of the existence of a conflict may be seen from the fact that the Appellate Court notes that in some instances the office of the Attorney General prosecutes criminal cases and that counsel here might have wished more business from that office and been denied it had he successfully defended Maurice Pendleton.

Certainly, mere involvement with prosecutorial offices in the past does not show a conflict on the part of counsel. Many fine defense attorneys are former prosecutors and their past experience has aided, not prejudiced, their respective clients. The more sensible rule, and the rule in conformity with the interpretation of the Sixth Amendment made by this Honorable Court, is that found in the "Illinois Code of Professional Ethics", Dr. 8-101(a)(5) (1970), which states that no public official shall undertake private employment where the possibility exists that this might conflict with his specific public duties in the same matter. So, for example, the Illinois State Bar Association in a professional ethics opinion published at 59 Illinois Bar Journal, Opinion 335 (1970), has found no improper conflict of interest in an Assistant Attorney General whose employment was limited to condemnation matters accepting employment as counsel in a criminal case.

We submit that clearly the court in this case, and in fact the State Courts of Illinois in general, have completely misconstrued the interpretation of the United States Constitution, Amendment VI, by this Court, thus mandating this Court's intervention by the Writ of Certiorari.

Two other matters involved in the instant case should be briefly noted before bringing this Petition to a close.

First, the Appellate Court does not even consider the fact that defendant was represented by another attorney who was not alleged to have been laboring under a conflict of interest. This circumstance, surely, would indicate that even had an actual conflict existed, the representation of counsel free from this conflict would have been sufficient to insure against possible resulting prejudice. See, *Commonwealth* v. *Wakeley,* 433 Pa. 159, 249 A. 2d 303 (1969). Had the Appellate Court below not errone-

ously applied a *per se* prejudice standard to the facts of this case, this factor would have weighed heavily against the showing by the instant defendant of the necessary prejudice. This matter may be better left for further discussion in the brief to be filed by the People if the Writ of Certiorari is granted.

Secondly, there was also stated in the Appellate Court as a ground for reversal the denial of due process and fair trial to the defendant due to the admission of certain evidence. We submit, however, that the clear thrust of the Appellate Court opinion is that the guilty verdict was set aside on the basis of *Glasser* v. *United States, supra.* Thus, discussion of any other point made by the Appellate Court may better await inclusion in the People's brief should Certiorari be granted.

Once more we urge this Court to allow review of the decision below on Writ of Certiorari, and to set aside that determination as erroneous under proper interpretation of the Sixth Amendment to the Constitution of the United States.

CONCLUSION

For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Appellate Court of Illinois, First District.

Respectfully submitted,

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APPENDICES

APPENDIX A

The following is a verbatim copy of the opinion of the Appellate Court of Illinois, First District, from which Leave to appeal to this Honorable Court is now sought.

No. 76-1116

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. MAURICE PENDLETON, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY — HONORABLE BENJAMIN MACKOFF PRESIDING

Mr. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court:

After a jury trial, defendant was found guilty of the murder of Deborah Goodlow and sentenced to 100 to 199 years imprisonment. On appeal, he presents the following issues for review: (1) whether defense counsel's position as a special assistant Attorney General constituted a conflict of interest which denied him the effective assistance of counsel; and (2) whether references to another crime denied him a fair trial.

Defendant had initially been charged with the murders of Dewey Crockett and Deborah Goodlow; but, in a prior trial, was convicted only of the Goodlow murder – which conviction was reversed on appeal and the cause remanded

for a new trial. (*People* v. *Pendleton* (1974), 24 Ill. App. 3d 385, 321 N.E. 2d 433.) Defendant's second trial resulted in a mistrial being declared during the jury's deliberation, and it is the third trial – in December, 1975 (referred to as the trial), which is the subject of this appeal.

On September 24, 1975, defendant's attorney, who had been appointed to represent him a month before, petitioned the court to withdraw, alleging that certain of his professional obligations precluded an adequate opportunity to prepare defendant's case. Included in the list of professional duties were two cases in which he had been appointed and was currently acting as a special assistant Attorney General. Defendant had previously requested the withdrawal of two former attorneys and, because he expressed regret at losing the services of another, the trial court questioned defendant and his attorney to ascertain whether they were personally satisfied with each other. Finding that they were, the court asked the attorney to reconsider whether his schedule would allow his continuation in the matter and, after an off-the-record discussion with defendant, his attorney withdrew the petition.

On December 8, 1975, prior to the commencement of jury selection, defendant's attorney informed the court and defendant that although he had six years of criminal law experience, including at least 60 bench trials, he had never tried a criminal case before a jury. At defendant's request, an attorney from the Chicago Bar Association Defense of Indigent Prisoners Committee was appointed to act as co-counsel to provide advice concerning the practices and procedures appropriate to jury trials. While defendant's original attorney principally conducted the defense during trial, his co-counsel was at all times available for consultation and actually argued several matters before

the trial court. Shortly after the State rested, however, defendant alleged that both defense attorneys had been deceiving him and, thereafter, he was permitted to defend himself with both attorneys in attendance as legal advisors. Later, for the purposes of post-trial motions, the same two attorneys were again appointed as defense counsel.

As a detailed summary of the evidence given in the first trial was reported in *Pendleton* and, as the testimony relevant to the issues before us is substantially the same, only those facts pertinent to this appeal will be set forth. It appears that at approximately 3 a.m. on March 31, 1970, Dewey Crockett and a man identified as defendant entered the Madison Park Hotel to visit Deborah Goodlow, a resident of the hotel. The two men were observed entering the elevator after receiving Deborah's permission to come to her apartment. Thirty to forty-five minutes later, Deborah, in a hysterical condition, entered the lobby from the stairwell and, begging for help, screamed that someone had been shot in her apartment. A hotel employee suggested that she hide behind the front desk, but she instead ran into a hallway in the western portion of the lobby and went out of the building through an exit there to an adjacent alley which ran north to Madison Park Street and south to Hyde Park Boulevard. Meanwhile, defendant exited the elevator and headed for the lobby's entrance onto Hyde Park. As he was opening the door, knocking could be heard coming from the west hallway, and defendant then changed direction and walked toward that hallway – from which he left through the same door Deborah had used.

From an apartment with a northern exposure and located half a block west of the hotel, a witness heard Deb-

orah screaming and observed her running down Madison Park in a westerly direction with a man he identified as defendant pursuing and eventually overtaking her. When they were within five feet of each other, she stopped, turned, and raised her hands in the air. Whereupon, defendant first shot her in the upper torso and, as she fell to her knees, shot her again in the face at point blank range.

At trial, defendant contested his identification in that the witnesses did not have adequate opportunities for observation under favorable conditions and because some of them gave vague and uncertain testimony.

Opinion

Defendant (represented on appeal by the State Appellate Defender) first contends that he was denied the effective assistance of counsel. He points to no specific conduct during the course of trial which would demonstrate the inadequacy of counsel, but he asserts that his attorney's commitment to the attorney general's office, whose interests conflicted with his, constituted a per se denial of the effective assistance of counsel. Initially, the State argues that the issue was not preserved for appeal. We disagree.

As a general rule, the failure to specify alleged errors in a written motion for a new trial or during argument on that motion waives these issues, and they cannot be urged as grounds for reversal. (*People* v. *Rowe* (1977), 45 Ill. App. 3d 1040, 360 N.E. 2d 436; *People* v. *Witherspoon* (1975), 33 Ill. App. 3d 12, 337 N.E. 2d 454; *People* v. *Spencer* (1972), 7 Ill. App. 3d 1017, 288 N.E. 2d 612.) While an attorney is ordinarily not expected to include his own inadequacy as a ground for reversal (*People* v. *Van Dyke* (1969), 106 Ill. App. 2d 411, 245 N.E. 2d 324), the State,

citing *People* v. *Wise* (1942), 379 Ill. 11, 39 N.E. 2d 319, argues that the issue of the ineffective assistance of trial counsel is waived where not raised in the post-trial motion of a second attorney who did not partake in the alleged error.

Here, co-counsel was appointed six weeks after the original attorney's affiliation with the Attorney General's office was mentioned in his petition to withdraw. Moreover, because original counsel had extensive experience in bench trials, it appears that co-counsel's appointment was not because of any possible conflict resulting from counsel's association with the attorney general; but, rather, was to provide advice and assistance relating to the nuances of trying a case before a jury. Under these circumstances, we find *Wise* inapposite. In that case, the second attorney appeared after sentencing and, of necessity, would have had to review the proceedings – which should have disclosed the conduct complained of prior to filing the post-trial motion; but, nonetheless, he failed to raise the issue of incompetency of trial counsel. Here, however, co-counsel was present during the entire trial and, because he was only assisting in the preparation of the post-trial motion, we cannot say that he should have known of an indicated conflict as he would not necessarily have been required to make a detailed examination of the record. In any event, we have found nothing to indicate that co-counsel was aware of the possible conflict. Consequently, we will consider the issue.

Effective assistance of counsel is a fundamental right, and an accused is entitled to the undivided loyalty of counsel free of commitments to others. (*Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457.) This right is deemed to have been denied where the interests of co-defendants represented by a single attorney are potentially

inconsistent (*Glasser*), where a fee earned through the representation of another client will be enhanced in the event of a less than vigorous defense of the accused (*People* v. *Meyers* (1970), 46 Ill. 2d 149, 263 N.E. 2d 81), where the future business of another client may not be forthcoming should a successful defense of the accused result (*People* v. *Stoval* (1968), 40 Ill. 2d 109, 239 N.E. 2d 441), and where the defense attorney is the recipient of the special assignment of cases by a state office (the Illinois Attorney General) which, under certain circumstances, is charged with the duty of prosecuting criminal cases (*People* v. *Cross* (1975), 30 Ill. App. 3d 199, 331 N.E. 2d 643), but not where the defense attorney has terminated his employment as a prosecutor subsequent to defendant's indictment (*People* v. *Newberry* (1973), 55 Ill. 2d 74, 302 N.E. 2d 34, unless there was an earlier representation of the State in that particular case (*People* v. *Kester* (1977), 66 Ill. 2d 162, 361 N.E. 2d 569). In *Cross*, defendant's trial counsel also served as a special assistant Attorney General for the purpose of handling inheritance tax matters, and the court held, "The attorney's representation of the defendants on the one hand and his affiliation with the Attorney General's office on the other constituted a per se conflict of interest."

Should defense counsel's commitment to others give rise to interests potentially conflicting with those of defendant, no actual prejudice need be shown. (*People* v. *Fuller* (1974), 21 Ill. App. 3d 437, 315 N.E. 2d 687.) The policy reason supporting this rule was succinctly stated in *Stoval*:

> "There is no showing that the attorney did not conduct the defense of the accused with diligence and resoluteness, but we believe that sound policy disfavors the representation of an accused, especially when counsel is appointed, by an attorney with possible conflict of interests. It is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict. Too, it places an additional burden on counsel, however conscientious, and exposes him unnecessarily to later charges that his representation was not completely faithful. In a case involving such a conflict there is no necessity for the defendant to show actual prejudice. [Citations.]" 40 Ill. 2d at 113, 239 N.E. 2d at 444.

Nevertheless, the State contends that no conflict existed in this case – that even if a conflict should be found, actual prejudice must be shown and that, even assuming actual prejudice need not be shown, defendant's rights were adequately protected by the appearance of co-counsel. Again, we disagree.

First, the State argues that *Cross* was too stringent in finding a per se denial of the right to the effective assistance of counsel in defense counsel's mere affiliation with the Attorney General's office. It asserts that the rule used in attorney discipline proceedings, *i.e.*, an attorney who holds public office may not accept private employment in matters over which he may potentially have responsibility as a public official (Illinois Code of Professional Responsibility, DR 8-101(A)(5)(1970)) ought to be applied to the facts on a case by case basis. In applying this criteria to the case at bar. the State concludes that counsel's "public office" was limited to two specific cases in which his public responsibility did not encompass the prosecution of murder cases, and it argues that no conflict resulted. We believe the State misapprehends the question involved and the policy reasons upon which the conflicts rule is grounded.

Here, defendant's attorney recited two active cases among his work load in which he was empowered to represent the people. The record does not disclose, however,

the extent of either his prior involvement with or his future expectancies from the Attorney General's office. The controlling aspect is not whether he personally would ever be assigned to assist in the prosecution of a murder case, but whether he is presently accepting and perhaps seeking future assignments from an office which possesses an interest adverse to defendant's, *i.e.*, the duty to assist in the prosecution of criminal cases whenever the interests of the people require it. (Ill. Rev. Stat. 1975, ch. 14, par. 4.) Viewed in this light, the reasoning of *Stoval* is particularly cogent. There, the supreme court noted that although defense counsel's firm's representation of the burglarized business and its owner was not directly involved in defendant's burglary trial, human nature being what it is, an acquittal or light sentence might cause the owner to take his future legal business elsewhere. So, too, in the instant case, the possibility is raised that future assignments from the Attorney General's office might be affected in some manner by counsel's conduct of the trial and/or the ultimate disposition of defendant's case.

Moreover, we think that *Kester, Meyers,* and *Stoval* make it clear that, as a matter of sound judicial administration, lawyers who are committed to others with potentially adverse interests to those of defendant should not be appointed. These decisions recognized that when matters of judgment and trial tactics are made in the name of the accused by an attorney with such concurrent commitments, even the most loyal and resolute defense attorney might be unable to conclusively establish the propriety of his actions, and it should be noted that none of these cases were grounded upon findings that the attorneys involved were subject to disciplinary action because they transforme dwhat should have been adversary proceedings into shams through the representation of both sides in

the same matter. Consequently, we believe that whether the representation of defendant here by an attorney concurrently accepting assignments as a special Attorney General amounted to censurable conduct, is immaterial to the question whether defendant was denied the right to the effective assistance of counsel.

Second, the State argues that defendant must make a threshold showing of some actual prejudice. It finds support for its position in the following language in *Glasser*:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the *amount* of prejudice arising from its denial. [Citations.]" (315 U.S. at 75-76, 86 L. Ed. at 702, 62 S. Ct. at 467 (Emphasis added).]

We find defendant's suggested interpretation of *Glasser* to be untenable, as immediately following the quoted statement it was held to be error of constitutional dimension for the trial court to appoint an attorney when apprised that to do so would commit counsel to the interests of defendant and another whose interests were potentially inconsistent. In the case at bar, the trial court was informed of counsel's association with the Attorney General's office prior to trial by the petition to withdraw. Under *Glasser,* defendant was at that point denied the right to the effective assistance of counsel and, therefore, *Glasser* can yield no authority for the proposition that defendant must adduce some act or omission by counsel during the course of trial to make a threshold showing of actual prejudice.

Third, assuming arguendo that a conflict existed and actual prejudice need not be shown, the State argues that co-counsel adequately protected defendant's rights. It relies upon *Commonwealth* v. *Wakeley* (1969), 433 Pa. 159, 249 A. 2d 303, which involved a defense attorney who had severed his employment as a prosecutor subsequent to defendant's indictment, but who apparently had no personal involvement in the early stages of defendant's case. After noting that "[i]t would perhaps be enough to answer that appellant was represented at trial by *two* attorneys, and had one of them had a conflict, the other was in a position to protect appellant's interests," the Pennsylvania Supreme Court found that no conflict existed. 433 Pa. at 162, 249 A. 2d at 304.

Initially, it can be noted that the quoted language in *Wakeley* is phrased as an aside and that the facts would not have raised a conflict under Illinois law. (*Newberry.*) Secondly, we do not believe that the existence of co-counsel can be a complete answer; particularly where, as here, it does not appear that co-counsel was informed of the conflict and his duties were limited to advice and assistance concerning the tactical aspects of a jury trial.

Kester, Meyers, and *Stoval,* in discussing the issue of waiver, observed that the influence upon counsel may be subliminal and extremely difficult to detect. As matters of judgment and trial tactics are influenced by numerous tangibles and intangibles, it is difficult to see how co-counsel, when unaware of the conflict, can offer defendant effective protection. Considering the subtleties involved, we believe that the following paraphrase of *Stoval* is the better rule concerning the issues of waiver and the effect of the existence of co-counsel: "[t]he difficulty in appropriately advising an accused of this right [or in co-counsel

detecting which decisions may have been subliminally affected by an unknown conflict] almost directs that counsel, especially one appointed, be free from any such conflict." (40 Ill. 2d at 114, 239 N.E. 2d at 444.) Consequently, we hold that where the defense attorney possesses a conflict arising from a commitment to others whose interests are inconsistent with those of defendant, the mere existence of co-counsel who had no knowledge of the conflict cannot offer an accused adequate protection, and that original counsel's appointment per se denied defendant the right to the effective assistance of counsel.

Defendant also contends that he was denied a fair trial by references to the commission of another crime. We disagree.

> "'Evidence which tends to prove a fact in issue is admissible though it may be evidence showing that the accused has committed a crime other than the one for which he is being tried, and evidence which goes to show motive, intent, identity, absence of mistake or *modus operandi* is admissible though it may show the commission of a separate offense.' [Citation.]"
> (*People* v. *Romero* (1977), 66 Ill. 2d 325, 330, 362 N.E. 2d 288, 290.)

Where, however, in the commission of the other crime, it is some (but less than all) of the accused's behavior which is probative rather than the actual commission of a crime itself, the testimony must be tailored so that the jury is apprised only of the behavior and not the commission of a crime. (*People* v. *Butler* (1974), 58 Ill. 2d 45, 317 N.E. 2d 35; *People* v. *Brown* (1972), 3 Ill. App. 3d 1022, 279 N.E. 2d 765. See also, *People* v. *Hicks* (1971), 133 Ill. App. 2d 424, 273 N.E. 2d 450.) Furthermore, a prosecutor may not indicate during argument that such behavior constituted the commission of a crime. (*Brown.*) Where evidence of

another crime has been erroneously placed before the jury, the State bears the burden of affirmatively showing that the error was not prejudicial. *Romero.*

Here, the testimony revealed that Dewey and defendant were frequent companions; that on the date in question he accompanied defendant to the hotel; that they entered the elevator to visit Deborah's apartment; that someone was shot in that apartment prior to her excited entry into the lobby; that defendant alone came down from her apartment and followed her out of the hotel; and that Dewey died on the same date as did Deborah. In closing argument, the prosecutor reminded the jury that they died on the same day. He also termed defendant as Dewey's "supposed" friend and imparted the additional information that when Dewey's father was called to the scene, he gave defendant's name to the police; whereupon, they included defendant's picture in the photographic spread shown to the witnesses. It cannot be gainsaid that Dewey's murder itself was probative of motive, intent, identity, absence of mistake, or *modus operandi* relevant to Deborah's murder. Therefore, as much of defendant's behavior as tended to make any fact at issue more or less probable was admissible (*People* v. *Allen* (1959), 17 Ill. 2d 55, 160 N.E. 2d 818), but only to the extent that the factual pattern revealed did not directly or indirectly show the actual commission of another crime (*Butler*; *Brown*). This principle ought to be strictly applied in cases where, as here, the accused was acquitted of the other crime.

As it would unduly lengthen this opinion to recite the probative value of each testimonial unit relative to Dewey, suffice it to say that while, under *Allen,* each individual fact may have been admissible as probative of the crime charged, in combination we find them so complete that

the jury was thereby informed of defendant's likely involvement in the death of Dewey. The problem could have been, in our opinion, eliminated by the exclusion of Dewey's exact date of death, as it was a fact of least probative value and, at the same time, the most inflammatory in completing the picture of the commission of another crime. While the State is entitled to explain his absence as a witness to rebut any adverse inference (*People* v. *Weinstein* (1965), 66 Ill. App. 2d 78, 213 N.E. 2d 115, *rev'd on other grounds* (1966), 35 Ill. 2d 467, 220 N.E. 2d 432), this could have been accomplished by testimony to the effect that he was deceased at the time of trial. Moreover, we think that any question in the jurors' minds which would have operated in favor of defendant's presumption of innocence was unfavorably affected by the prosecutor's argument informing them that Dewey's father was called to the scene of his son's murder and that he gave defendant's name to the police to assist them in identifying his son's murderer.

Finding that evidence of another crime was erroneously adduced at trial, the question remains whether the State has affirmatively shown that the error was non-prejudicial. (*Romero.*) Our review of the record demonstrates to our satisfaction that the State has failed this burden and that the case must accordingly be remanded for a new trial.

To avoid the recurrence of prejudicial error, we would call attention to the procedure followed by the trial courts in *Butler* and *Brown.* In those cases, pursuant to defense objections, the trial courts listened to summations of the prospective testimony of witnesses prior to their taking the stand and instructed the prosecutors regarding what facts may and may not be elicited.

In the case at bar, defendant's motion in limine to exclude evidence pertinent to Dewey's murder was denied, as the trial court ruled that the relevancy of evidentiary matters is more properly ruled on as each fact arises. We do not disagree with this general principle; however, since the effect of the erroneous admission of other crimes evidence can be so highly prejudicial (*People* v. *Deal* (1934), 357 Ill. 634, 192 N.E. 649), we believe that in factual situations such as we have here the beter practice is set forth in *Butler* and *Brown*.

We note further that defendant, in his closing argument, informed the jury that he was acquitted of Dewey's murder. While we can understand his possible frustration and impatience resulting from the nature of the prosecutor's argument, we must remind him that in representing himself he is bound to abide by the law and seek relief in this court, rather than to further inflame the jury by introducing matter not in evidence through his argument.

For the foregoing reasons, the judgment of the circuit court is reversed and the cause remanded for a new trial.

Reversed and remanded.

LORENZ and WILSON, J. J., concur.

APPENDIX B

[Seal of the Supreme Court of Illinois]

STATE OF ILLINOIS
OFFICE OF

CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

Clell L. Woods, Clerk Phone: 217-782-2035

November 23, 1977

Mr. Lee T. Hettinger
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No. 50013 – People State of Illinois, petitioner,
vs. Maurice Pendleton, respondent.
Leave to appeal, Appellate Court,
First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court.